UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

98 M.S.P.R. 377

MARY SCHNEIDER,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
AT-0752-03-0875-I-1

DATE: March 30, 2005

Donald Appignani, Esquire, Lauderhill, Florida, for the appellant.

Laura Carroll, Esquire, South Burlington, Vermont, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision issued on June 21, 2004, sustaining her 30-day suspension. For the reasons set forth herein, we GRANT the petition, VACATE the initial decision, and REMAND the appeal to the Atlanta Regional Office for further adjudication.

BACKGROUND

¶2 Effective June 2, 2003, the Department of Homeland Security, Bureau of Citizen and Immigration Services (agency), suspended the appellant, a GS-12 District Adjudication Officer, for 30 days. Initial Appeal File (IAF), Tab 7,

Subtabs 4e, 4j. The agency took this adverse action based on two charges: the appellant's refusal to cooperate in an official investigation (refusing to answer an investigator's questions about a charge that the appellant had lodged "concerning document bribery and illegal data entry" by an agency employee, IAF, Tab 7, Subtab 4j); and the appellant's unauthorized acquisition of a personal document (photocopying a time and attendance report of another employee without permission, *id*.).

¶3 The appellant petitioned for appeal. IAF, Tab 1. Based on the record developed by the parties, including the hearing that was held on April 14, 2004, the administrative judge sustained the agency's action. He found that the appellant stipulated that she engaged in the conduct identified in the agency's adverse action charges and that the agency therefore proved its charges. IAF, Tab 24, Initial Decision (ID) at 2-3.

¶4 The administrative judge also found that the appellant failed to prove her affirmative defense of retaliation for whistleblowing disclosures regarding "her belief that alien applicants for naturalization, green cards, and other benefits had bribed various officials at INS Orlando such that these officials were approving these applicants for citizenship despite the appellant's contention that these applicants had engaged in fraudulent behavior (e.g., sham marriages, forgery, bigamy, perjury, etc.)." ID at 4. The administrative judge found that the appellant failed to make a nonfrivolous allegation that a reasonable person in her position could conclude that her allegations concerned violations of law. ID at 15. He also found that, even if the appellant's disclosures were protected, she did not show that such disclosures were a contributing factor to her suspension because the agency imposed the 30-day suspension "more than five years after the appellant's April 1998 disclosures." ID at 15-16.

¶5 Additionally, the administrative judge found that the appellant failed to show that the agency treated her disparately from another employee, Richard Ramirez, who had refused to cooperate in an investigation. ID at 17-18. He

found that, although Ramirez similarly had refused to cooperate in an investigation and the agency did not discipline him, the appellant's situation differed from Ramirez' because the agency settled Ramirez' discrimination law suit in a sealed agreement and the agency's settlement official instructed other officials, including the deciding official in this case, John Bulger, not to pursue discipline against Ramirez. ID at 18. He further found that the appellant's situation differed from Ramirez' because there was no evidence that Ramirez engaged in the unauthorized acquisition of agency documents bearing the personal information of other employees. *Id.*

¶6 The appellant has petitioned for review. Petition for Review File (RF), Tab 1. The agency has not responded to the petition.

ANALYSIS

The appellant did not show that the administrative judge was biased.

¶7 In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The party must show that any such bias constitutes extrajudicial conduct rather than conduct arising in the administrative proceedings before him. *Ali v. Department of the Army*, 50 M.S.P.R. 563, 568 (1991). In her petition, the appellant asserts that the administrative judge was biased because he made inaccurate factual determinations and erroneously allowed the agency's deciding official to consider the appellant's performance in making the penalty determination, he denied the appellant a witness, and he limited the appellant's testimony and time to develop her closing argument. The appellant's allegations of bias arise from some of the administrative judge's rulings against the appellant and, under the circumstances of this case, do not exhibit extrajudicial conduct or bias. Thus, her allegations of bias fail to overcome the presumption of honesty and integrity that accompanies administrative adjudicators.

The administrative judge erred in finding that the appellant did not have a reasonable belief that she disclosed violations of law.

¶8 When an appellant raises whistleblowing as an affirmative defense to an agency action over which the Board has jurisdiction, the appellant must show by preponderant evidence that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), i.e., a disclosure of information that she reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Hood v. Department of Agriculture*, 96 M.S.P.R. 438, ¶ 12 (2004). To establish that the appellant had a reasonable belief that a disclosure met the criteria of § 2302(b)(8), she need not prove that the circumstances disclosed actually established a regulatory violation or any of the other situations detailed under § 2302(b)(8); instead, she must show that the matter disclosed was one which a reasonable person in her position would believe evidenced any of the situations specified in § 2302(b)(8). *Garst v. Department of the Army*, 60 M.S.P.R. 514, 518 (1994). The proper test for determining whether an employee had a reasonable belief that she made protected disclosures is this: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act? *Ray v. Department of the Army*, 97 M.S.P.R. 101, ¶ 23 (2004).

¶9 Here, the appellant testified that, in about June 1998, a married couple, whose daughter was married to an alien (his fourth marriage to an American woman), called her after they had received numerous phone calls over a number of months from someone who claimed to be the appellant. Hearing Transcript (HT) at 209-210. She testified that, initially, the couple and their daughter were angry with the appellant for making the calls, but, as they continued their conversation with the appellant, the wife noted that the voice on their answering

machine was different from the appellant's, and so they agreed to come to see the appellant in person. HT at 212-13. She testified that the wife of the couple informed the appellant of the phone number that had appeared on her caller identification and that the appellant recognized the number as that of the Orlando International Airport Immigration Inspections booth. HT at 210.

¶10 The appellant testified that the couple then came to see her in person and told her about money orders (one in the amount of $1500) drawn on a Tampa bank, apparently by their alien son-in-law who had a case pending before the appellant, and made out to the appellant's supervisor and to another agency employee. HT at 211-15. The appellant also testified that the couple suspected their alien son-in-law of being associated with Osama Bin Laden's brother, who was living in Orlando. HT at 215. She asserted that, after their meeting, the couple called her again to say that their son-in-law knew of their meeting with the appellant and he said that he learned of the meeting from the appellant's supervisor. HT at 215. She said that an agency investigator from the Office of the Inspector General approached her in February 1999 about the allegations made by the couple; she maintained that the investigator had gone to see the couple and, according to what the couple told her, he had harassed them. HT at 228. She also testified that her supervisor took the alien son-in-law's case from her and, to her knowledge, the case remains undecided with her supervisor. HT at 216.

¶11 The appellant also testified that other persons, including some agency employees whom she named, had come to her over the years since 1998 and told her of theft from aliens by agency personnel at the airport. HT at 228-31. The appellant testified that she has given this information to a number of officials repeatedly over the years from 1998 to 2003 because she had not heard of anyone doing anything about it. HT at 225. She testified that, to her knowledge, no one followed up on the additional allegations of theft from aliens. HT at 229-31.

¶12 The appellant has reiterated her assertions – that someone impersonated her, that her supervisors took bribes, and that agency personnel were stealing from aliens as they arrived in the United States – numerous times to government officials, including Attorney General John Ashcroft and the Director of the Department of Homeland Security Tom Ridge.[1] She made the most recent of these disclosures in January 2002. IAF588, Tab 6 (Exhibit 19). At issue is whether the appellant had a reasonable belief that the information she disclosed evidenced violations of law, i.e., impersonating a federal employee, acceptance of bribes by federal employees, and theft by federal employees.

¶13 In making a disclosure involving a violation of law, rule, or regulation, it is not necessary that the disclosure specify a particular kind of fraud, waste, or abuse that the Whistleblower Protection Act (WPA) was intended to reach; the inquiry into whether a disclosure is protected ends upon a determination that the appellant disclosed a violation of law, rule, or regulation. *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 11 (2000). There is no de minimis exception for the violation of any law, rule, or regulation aspect of the WPA's protected disclosure standard. *See id.* ¶¶ 8-11 (a disclosure concerning the violation of any law, rule, or regulation under 5 U.S.C. § 2302(b)(8)(A)(i) does not require that such violation be gross or substantial to qualify as a protected disclosure, whereas 5 U.S.C. § 2302 (b)(8)(A)(ii) contains qualifying language such as “gross” and

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[1] On October 10, 2002, the agency proposed to suspend the appellant and she filed a complaint with the Office of Special Counsel (OSC) alleging that the agency proposed the action in retaliation for her whistleblowing. After OSC did not take action on her complaint for 120 days, she filed an individual right of action (IRA) appeal with the Board, which was docketed as *Schneider v. Department of Homeland Security*, AT-1221-03-0588-W-1. IAF588, Tab 1. The appellant submitted into the record in her IRA588 appeal a list of 21 alleged protected disclosures. Although the administrative judge referenced these alleged disclosures in his initial decision, he did not put a copy of them into the record in this appeal. The list of the appellant’s disclosures, submitted into the record in the IRA588 appeal, is hereby incorporated as part of the record in this appeal. The record in the IRA588 appeal is cited as IAF588.

"substantial" when referring to disclosures about gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety). The WPA's requirement that an employee identify a specific law, rule, or regulation does not necessitate that he identify a statutory or regulatory provision by title or number when the employee's statements and the circumstances of those statements clearly implicate an identifiable law, rule, or regulation. *Langer v. Department of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). The appellant only needs to show that he reasonably believed that his disclosure evidenced one of the conditions set forth in 5 U.S.C. § 2302(b)(8). *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 12 (2004).

¶14 Here, the couple who allegedly had received calls from someone impersonating the appellant, and had evidence that her supervisor had accepted bribes, did not testify at the hearing, nor did the agency employees who allegedly told her about the thefts from aliens. However, nothing in the record suggests that the appellant did not have the interchanges with the couple, that the appellant did not receive reports from agency employees of thefts from aliens, or that the appellant had reason to believe that these individuals were not accurately reporting what they knew. We find therefore that the evidence does not suggest that the information that the appellant received from these sources was unbelievable. Further, we find that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could have reasonably concluded that, when she disclosed what the couple and agency employees told her, she was disclosing actions of the government employees that evidenced violations of law.[2] *See Ray*, 97 M.S.P.R. 101, ¶ 23.

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[2] Although the appellant did not cite any specific law that had been broken by the government employees whom she identified and was not required to do so, we note that pretending to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof and acting as such is a violation of the federal criminal code. *See* 18 U.S.C. § 912. Additionally, it is a violation of the federal criminal code for an employee of the United States to convert wrongfully, to his

¶15 Moreover, the appellant's disclosures remained protected at each iteration. *See Sutton v. Department of Justice*, 94 M.S.P.R. 4, ¶ 15 (2003) (finding that the appellant's alleged whistleblowing disclosure, initially made in June 1997 and repeated later in September 1997, October 1998, and March 1999 to various individuals, was a contributing factor in the agency's September 1998 letter of reprimand, August 1999 notice of proposed removal, and January 2000 decision to remove), *aff'd*, 97 Fed. Appx. 322 (Fed. Cir. 2004). There is no evidence of record to show any investigation of the appellant's allegation that she had been impersonated to her detriment. The allegation that the appellant's supervisors took bribes from aliens was investigated; but, because nothing in the record contradicts the appellant's testimony that the case of the alien who allegedly made the bribes remained undecided, she had reason to believe that the investigation was incomplete. There is also no evidence to contradict the appellant's testimony that she received information indicating that agency employees continued to steal from aliens.

The appellant established that her protected disclosures were a contributing factor to this 30-day suspension.

¶16 An employee who establishes that she made a protected disclosure has the additional burden of showing that the disclosure was a contributing factor in the personnel action. *Johnson v. Department of Defense*, 95 M.S.P.R. 192, ¶ 8 (2003), *aff'd*, 97 Fed. Appx. 325 (Fed. Cir. 2004). An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). Thus, an appellant's submission of evidence that the official

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own use, the money or property of another who comes under his control in the execution of his office. *See* 18 U.S.C. § 654.

taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, i.e., evidence sufficient to meet the knowledge/timing test, satisfies the contributing factor standard. *See Horton v. Department of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995).[3]

¶17 Here, the appellant made the requisite showing to establish that her disclosures were a contributing factor in this 30-day suspension. She established that deciding official Bulger knew of her protected disclosures when they were made in 1998[4] and he was aware that she continued to make the same disclosures.

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[3] As illustrated in *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 13 (2003), and *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 155-57 (1995), we are constrained by the *Horton* court's interpretation of 5 U.S.C. § 1221(e)(1) to make a finding of contributing factor in the appellant's favor based on a limited portion of the evidence of record, namely, circumstantial evidence of knowledge and timing. We would not necessarily find that the appellant's whistleblowing was a contributing factor in her suspension if we considered and weighed all of the evidence, which is what a factfinder normally does where, as here, there has been an evidentiary hearing. *See U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15, 103 S. Ct. 1478, 1481-82 (1983).

[4] In 1999, the appellant filed an IRA/adverse action appeal of the agency's actions suspending her for 30 days and placing her in absence without leave (AWOL) status, which appeal was docketed as *Schneider v. Department of Justice*, AT-1221-00-0263-W-2. The administrative judge found that the appellant established that the agency took these actions in retaliation for the appellant's whistleblowing activity (disclosing, e.g., that agency officials accepted bribes from aliens to grant immigration benefits and were derelict in their duty to prevent marriage fraud), to which the parties had stipulated. He ordered corrective action. The Board denied the agency's petition for review of the initial decision, which thus became the final decision in the case. *Schneider v. Department of Justice*, 92 M.S.P.R. 228 (2002) (Table). Despite the finding in *Schneider v. Department of Justice*, AT-1221-00-0263-W-2, that the disclosures, iterated to form the basis of the appellant's affirmative defense of whistleblowing retaliation in this appeal, were protected, we decline to apply the principle of collateral estoppel to find that these disclosures were protected here. The question of whether a disclosure is protected under 5 U.S.C. § 2302(b)(8) is a matter of mixed fact and law and stipulations relating to such matters are not binding. *See Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996).

Although Bulger would not characterize the appellant's disclosures as protected whistleblowing, he admitted that he was aware of what he called the appellant's "allegations" and that the appellant had made these allegations "over the years." HT at 51. He noted that the appellant's name had appeared in the newspapers with regard to her allegations. *Id*. One of these newspaper articles appeared in the New Times, a Broward-Palm Beach, Florida, newspaper, on November 8, 2001. IAF588, Tab 6 (Exhibit 14). The agency proposed the appellant's suspension 11 months after the appearance of that article, or within a period of time such that a reasonable person could conclude that the disclosures were a contributing factor in the personnel action. *See, e.g., Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (suspension proposed 18 months after the employee's protected disclosure occurred within a period of time such that a reasonable person could conclude that the appellant's disclosures were a contributing factor in the personnel action).[5]

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[5] Interspersed with the disclosures that we have found to be protected, the appellant made many other disclosures that were not protected. For instance, she disclosed that, although she would have denied benefits to a number of aliens in cases before her, her supervisors approved the benefits. IAF588, Tab 6 (Exhibits 2, 4). The appellant failed to establish that a disinterested observer with knowledge of the facts presented by the appellant would conclude that the supervisors' actions constituted gross mismanagement or an abuse of authority rather than a valid disagreement regarding whether the benefits should have been denied in the cases. Similarly, the appellant's assertion that she had, through the cases she was handling, uncovered "six (6) Felony Fraud Sham Marriage RINGS" through videotaped confessions and in four of these rings her supervisors allowed the conspirators to leave the agency, *id*. (Exhibit 6), appears to a disinterested observer to be a valid disagreement between the appellant and her supervisors. Also, the appellant disclosed that her supervisors removed "over 200 felony fraud files" from her office. *Id*. (Exhibit 3). The record establishes that the appellant had a backlog in excess of 200 cases more than any of her peers. Thus, the appellant failed to establish that a disinterested observer would conclude that her supervisors' removal of the files constituted gross mismanagement rather than the exercise of proper case management.

The appeal must be remanded for the taking of additional testimony.

¶18 Once an appellant has established that a protected disclosure was a contributing factor in the contested personnel action, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. § 1221(e)(1), (2); *see Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than preponderant evidence. 5 C.F.R. § 1209.4(d).

¶19 In determining whether an agency has met its burden by clear and convincing evidence, the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).[6] Because the action taken by the agency officials must be weighed in light of what they knew at the time they acted, in determining whether an agency has met its burden of rebutting the appellant's prima facie case by clear and convincing evidence, the Board must assess the evidence as it stood at the time the officials acted. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

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[6] The factors that the Board will consider to determine whether an agency establishes by clear and convincing evidence that it would have taken an adverse action absent an employee's whistleblowing were announced in *Geyer v. Department of Justice*, 70 M.S.P.R. 682 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997) (Table); however, because these factors were specifically approved by the court in *Carr*, 185 F.3d at 1323, we refer to them as the *Carr* factors.

¶20 As explained above, the administrative judge found that the appellant did not establish that she had a reasonable belief that she made a protected disclosure. Thus, he did not reach the issues of whether the appellant proved that her disclosures were a contributing factor in the suspension and whether the agency proved by clear and convincing evidence that it would have taken the same action absent the appellant's whistleblowing. Having determined that the appellant met her burden of proving that her disclosures were protected and that they were a contributing factor in her 30-day suspension, the Board must apply the *Carr* factors to determine whether the agency met its burden.

¶21 The appellant has consistently asserted that the testimony of Richard Ramirez is relevant and material to the *Carr* factors, as well as to the reasonableness of the penalty. We agree. The appellant requested Ramirez as a witness at her hearing in this appeal. IAF, Tab 17. She stated that he was expected to testify that, when he worked for Bulger, then the interim director of the agency's Florida District, Ramirez refused, on several occasions, an order from an investigator to testify and yet he was never disciplined. *Id*. The administrative judge denied Ramirez as a witness without explanation. IAF, Tab 18. The appellant objected to the administrative judge's denial of Ramirez as a witness, arguing that Ramirez should at least be available to testify as a rebuttal witness, depending on Bulger's testimony regarding the circumstances around Ramirez' refusal to assist the investigator. IAF, Tab 19; HT at 127, 232. Thus, the appellant preserved her objection to the administrative judge's denial of Ramirez as a witness.

ORDER

¶22 Accordingly, we remand this appeal for the administrative judge to reconvene the hearing to take Ramirez' testimony. The parties may be allowed such additional witnesses at the reconvened hearing as are necessitated by Ramirez' testimony and their respective burdens of proof and production. The

administrative judge shall issue a new initial decision[7] that finds, based on all of the evidence including Ramirez' testimony, whether a 30-day suspension is within the bounds of reasonableness for the sustained misconduct considering the factors of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), and whether, in light of the *Carr* factors, the agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of the appellant's protected disclosures.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

[7] In the now vacated initial decision, the administrative judge afforded the appellant mixed-case appeal rights, i.e., the appeal rights of an employee who has alleged an affirmative defense of prohibited discrimination. IAF, Tab 24. The appellant, however, did not allege prohibited discrimination and this appeal is not a mixed case.